

ABOUT THE BOARD

On February 1, 2004, the Board of Review began exercising exclusive jurisdiction over all appeals from the Worker's Compensation Office of Judges.

The Workers Compensation Board of Review consists of three members who are appointed by the governor from names submitted by the "Workers' Compensation Board of Review Nominating Committee". By law, no more than two Board members may be from the same political party. Initially, one member of the Board was appointed for a period of two years, one member was appointed for four years, and the third member was appointed for a period of six years. Hereafter, the members will be appointed for a term of six years.

Prior to July 1, 2005, all claims were filed with the Workers Compensation Commission, and all initial rulings were made by the Commission. After July 1, 2005, claims are filed with an employer administrator who processes the claim. If any party is in disagreement with the original findings, a protest may be filed. The claim is then presented to the Office of Judges for litigation processes. After all proceedings are finalized and all evidence has been submitted, the Administrative Law Judge prepares a final order setting forth Findings of Fact and Conclusions of Law. At this stage, should a party disagree, an appeal may be filed to this Board.

The Board's responsibility is to review the final action of the Administrative Law Judge. There are cases where at least two of the parties appeal. For example, the claimant may contend that he/she is entitled to more than the Office of Judges awarded; the employer or Commission may contend that not only is the claimant not entitled to a greater award but, he/she should not have been awarded as much as he/she received from the Office of Judges.

When the claim gets to the Workers' Compensation Board of Review, the matter is heard strictly as an appellate case. The Board is not an evidentiary taking body, and the case does not come to the Board *de novo*.

Thus, the hearings before the Board are confined to the evidence presented before the Commission/Administrator and the Office of Judges. It is noteworthy that this is due to a change made back in 1990. Prior to the legislative action in 1990 which created the Office of Judges, the Board could hold *de novo* hearings and receive new evidence. It is important for claimants, employers, and attorneys practicing before the Board to understand that new evidence cannot be introduced to the Board. The Board must decide the case on evidence which was presented to the Administrative Law Judge. Instead of affirming, reversing or modifying the decision of the Administrative Law Judge, the Board may, upon motion of any party or upon its own motion, remand the case to the Insurance Commission or the Chief Administrative Law Judge for the taking of such new, additional or further evidence as in the opinion of the Board may be necessary for a full and complete development of the facts of the case.

There are guidelines that the Board must follow when reviewing a case. These are set out in Chapter 23 of the West Virginia Code and are as follows:

[The Board of Review] shall, reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

- 1) In violation of statutory provisions; or
- 2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
- 3) Made upon unlawful procedures; or
- 4) Affected by other error of law; or
- 5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- 6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In Conley v. Workers' Compensation Division, 199W.Va.196, 203, 483 S.E.2d 542, 549 (1997), the Supreme Court of Appeals further advised the Board as follows:

The legislature has seen the need to craft bright lines between rulings by the Office of Judges and review of those rulings by the Appeal Board. The legislature has determined by its enactment of

West Virginia Code § 23-5-12(b) that the Appeal Board, in essence, must accord deference to decisions by the Office of Judges. The legislature has not instructed the Appeal Board to adopt every decision by the Office of Judges. However, the legislature has made clear the standard by which the Appeal Board may reverse a decision by the Office of Judges. The legislature has made it mandatory that the Appeal Board apply the standard of review set out in West Virginia Code § 23-5-12(b). This Court has the authority and constitutional duty to uphold this legislative mandate.

Therefore, the Court held that when the Board reviews a ruling from the Office of Judges, it must do so under the standard of review set out in West Virginia Code § 23-5-12(b), and that failure to do so constitutes reversible error.

The Board of Review receives the entire record from the Office of Judges and reads all documents filed with it, including the Administrative Law Judge's opinion and the attorneys' legal briefs. The Board judges each case on its own merits and applies to each case both statutory and case law.

The Board sets a time and place for the hearing of oral arguments that have been requested by the parties. Oral arguments are welcome, but they are optional by the respective attorneys or individuals without attorneys. Prior to the parties' presenting their cases during oral argument proceedings, the entire record of each docketed case, along with the briefs filed in each case are reviewed by the Board. The Board privately deliberates and renders its rulings. During 2005, the Board reviewed and decided 6114 cases.

The volume of work at the Board of Review has increased greatly over the past years. This is the result of a number of factors. For example, in 1995, the Legislature made a major overhaul of the Workers' Compensation laws. This overhaul naturally challenges the creative abilities of attorneys practicing Workers' Compensation law. One way to fine tune and interpret differences of opinion regarding what a certain statute means or how it can interact with another statute is to file an appeal and receive a decision from the Board.

Should any party to these proceedings not be satisfied with the Board's decision, the case may be appealed to the West Virginia Supreme Court of Appeals. Unlike an appeal filed with the Workers' Compensation Board of Review, who must take and review all appeals from the Office of Judges, the party must file a petition for an appeal with the Supreme Court of Appeals. The Supreme Court may grant or refuse to hear the petition. If the case does get in for consideration, then it is reviewed by the Court on its merits. The Supreme Court of Appeals will not reverse a finding of fact made by the Board unless the Court finds that the finding is clearly wrong. Findings of fact of the Board are conclusive unless they are manifestly against the weight of the evidence, and the findings of the Board will not be disturbed on review unless they are clearly wrong. However, an order of the Board will be reversed where it is not substantiated by the evidence or where the legal applications of the Board are erroneous.

In summary, any employer, employee, claimant, dependent or the Insurance Commission is accorded the right to appeal any final order of the Office of Judges to the West Virginia Workers' Compensation Board of Review. The Board then reviews the case on its merits. It cannot take new evidence, but it does review the entire record and must then make a decision based on the evidence before it. The Board will not reverse the Administrative Law Judge unless the Judge's decision is in violation of statutory provisions or unless the Judge is clearly wrong in light of the reliable, probative and substantial evidence on the whole record, or has misinterpreted the law, exceeded his/her authority, made a procedural error or has exceeded the extent of his/her discretion. After review, the Board will either affirm the order of the Office of Judges, remand the claim to the Office of Judges or the Administrator for further proceedings, or reverse, vacate or modify the order of the Office of Judges.

This overview hopefully provides some insight to those of you who are interested in the West Virginia Workers' Compensation laws and the procedures developed for implementation and application of these laws. If the Workers' Compensation Board of Review can be of assistance to you, please

contact us at P. O. Box 2628, Charleston, WV 25329, or you may reach us by telephone at 558-5230. The goal of the Board is to continue its service to the State of West Virginia.